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December 20, 2004

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: July 15, 2004

Case No.: TIA-0141

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits for her late husband, XXXXXXXXX (the Worker). The OWA referred the application to an independent Physician Panel (the Panel), which determined that the worker's illnesses were not related to his work at a DOE facility. The OWA accepted the Panel's determination, and the Applicant filed an Appeal with the DOE's Office of Hearings and Appeals (OHA), challenging the Panel's determination. As explained below, we have concluded that the appeal should be dismissed as moot.

I. Background

A. The Relevant Statute and Regulations

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. ' ' 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B provided for a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D provided for a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. ' 7385o(d)(3); 10 C.F.R. Part 852 (the Physician Panel Rule). The OWA was responsible for this program, and its web site provides extensive information concerning the program at <http://www.eh.doe.gov/advocacy/>.

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that was accepted by the OWA, and a final decision by the OWA not to accept a Physician Panel determination in favor of an applicant. The instant appeal was filed pursuant to that Section. The Applicant sought review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. ' 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004). Congress added a new subpart to the Act - Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims. In addition, under Subpart E, an applicant is deemed to have an illness related to a work related toxic exposure at DOE, if the applicant received a positive determination under Subpart B.

During the transition period, in which DOL sets up the Subpart E program, OHA continues to process appeals of negative OWA determinations.

B. Procedural Background

The Worker was employed as a guard at the DOE's Paducah Gaseous Diffusion Plant (the Plant). He worked at the plant for fifteen years, from 1951 to 1966. Under the DOL Program, it was determined that the Worker was a member of the "Special Exposure Cohort" and that he developed multiple myeloma during his employment at a DOE facility.¹ Accordingly, the Applicant received compensation under that program.

The Applicant filed an application with the OWA, requesting physician panel review of claims of multiple myeloma and amyloidosis. The Applicant asserted that the Worker's illnesses were the result of exposure to hazardous chemicals at the Plant. The Physician Panel rendered a negative determination for both of these illnesses. The Panel found insufficient evidence to establish a diagnosis of multiple myeloma. The Panel agreed

¹ See 20 C.F.R. § 30.210.

that the Worker had amyloidosis, but found insufficient evidence of toxic exposures to find that it was work-related.

The OWA accepted the Physician Panel's negative determinations and, subsequently, the Applicant filed the instant appeal.

II. Analysis

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to exposure to toxic substances during employment at a DOE facility. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to a toxic exposure at the DOE site, and state the basis for that finding.²

The Applicant argues that the Physician Panel erred when it found insufficient evidence of multiple myeloma. The Applicant points to the DOL Subpart B determination that the Worker had multiple myeloma. The Applicant also provides a number of articles about multiple myeloma, discussing its relationship with amyloidosis, the other claimed illness. Although the Applicant recognizes that the record does not contain radiation exposure records, she asserts that "her husband's duties kept him in buildings where uranium, technetium, plutonium, beryllium, cadmium, mercury, hydrofluoric acid, uranium tetrafluoride, etc., were stored and processed."³ Moreover, she states that "no protective equipment was offered or provided to [her] husband who would spend entire shifts in the hazardous environments."⁴ Finally, she cites various dispensary visits as evidence of toxic exposures.

Subpart E has rendered moot the physician panel determination. The Applicant's positive DOL Subpart B determination satisfies the Subpart E requirement that the illness be related to toxic exposure during employment at DOE. The Applicant received a positive DOL Subpart B determination for multiple myeloma, and the panel report recognized that amyloidosis is associated with multiple myeloma. Accordingly, consideration of alleged errors in the Panel report is not necessary.

² 10 C.F.R. § 852.12.

³ Applicant's Appeal Letter dated July 7, 2004, at 3.

⁴ *Id.*

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0141 be, and hereby is, dismissed as moot.
- (2) This is a final order of the Department of Energy

George B. Breznay
Director
Office of Hearings and Appeals

Date: December 20, 2004